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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 426

SAMUEL STROBL,

Petitioner,

v.

JOHN ZIDEK, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT FOR THE FIRST DISTRICT OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

PETITION.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Now comes Samuel Strobl, petitioner, appearing *pro se,* and respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Court for the

First District of Illinois reversing the decree of the Superior Court of Cook County, Illinois, reviving a previous decree of that Court in favor of petitioner and against the respondent in the case entitled *Samuel Strobl* v. *John Zidek, Jr.*, which is reported in 304 Illinois Appellate Court Reports 385. Said judgment was rendered on April 8th, 1940, and a petition by the plaintiff therein, the petitioner herein, to the Supreme Court of Illinois for leave to appeal to that court from said judgment was denied by it on June 17th, 1940, thereby finally exhausting petitioner's remedy in the State courts (R. 158).

The Matter Involved.

The decree of the Superior Court of Cook County, Illinois (R. 65), from which respondent prosecuted his said appeal to the Appellate Court for the First District of Illinois, revived a decree rendered by that Court on January 7th, 1924, which had awarded the petitioner the sum of $12,782.07 as damages for the wrongful destruction of his business by the respondent (R. 10).

On the same day that the original decree was rendered the respondent filed his voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, Eastern Division, in which he scheduled the petitioner as a creditor (R. 8).

The petitioner filed his claim based upon his said money decree and it was allowed (R. 15). No creditors in that proceeding received any dividends (R. 33). The petitioner filed his objections to the respondent's discharge, stating in the usual form that his claim would be affected by the discharge (R. 16). Prolonged litigation over the discharge ensued, which was finally terminated shortly before the suit to revive the decree was instituted (R. 19).

Respondent at no time procured any injunction against the enforcement of the original decree, and pending the final decision on his objections to the discharge the petitioner took out execution on the decree which was returned *nulla bona* (R. 34).

The money decree was rendered upon petitioner's bill of complaint in which he prayed for the equitable relief of the cancellation of a contract of various judgments procured by respondent against him, of various promissory notes he had given to respondent, for the return to him by respondent of his patent for the manufacture of metallic wheels to which the respondent had procured title and for an accounting (R. 30-31). In addition the bill stated a separate cause of action *in tort* against the respondent for the wrongful destruction by him of petitioner's business of manufacturing said patented wheels and prayed for damages thereby sustained by him (R. 31). The case was heard by a Master in Chancery who found the facts in favor of the petitioner, recommended that the said equitable relief prayed for by the petitioner be granted him, and that in addition he be allowed a money decree for the sum of $12,782.07 as damages for the loss of profits suffered by him in consequence of the said destruction of his business which the Master found was intentionally done by respondent to ruin petitioner (R. 32-100).

The Master found that the entire course of conduct of the respondent showed his determination to ruin the petitioner (R. 92).

The Chancellor of the Superior Court of Cook County, Illinois, affirmed the Master's report, decreed the equi-

table relief prayed for and in addition awarded the petitioner the said money decree for damages (R. 9-10).

Jurisdiction of the Court, 28 U. S. C. A. No. 344 (b) (Jud. Code No. 237 as amended.)

The basis upon which the petitioner contends that this Court has jurisdiction to review the said judgment of the Appellate Court for the First District of Illinois is that that State Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court, in that it has decided that, because the petitioner unsuccessfully opposed the respondent's discharge in bankruptcy, he thereby waived the exemption of his claim under Section 17 of the Bankruptcy Act as one for the malicious and willful injury by the respondent to the petitioner's property (R. 6).

Questions Presented.

The questions presented are:

(a) Whether the exemption of a claim under Section 17 of the Bankruptcy Act is waived by the filing of the claim in the bankruptcy proceeding and having it allowed.

(b) Whether the claimant by opposing the discharge in bankruptcy is estopped to proceed in the State Court and collect his judgment.

(c) Whether, where the issue of the exemption of petitioner's claim was not raised, litigated or determined in the bankruptcy proceeding, would the bankrupt's general discharge be considered as *res judicata.*

Specifications of Errors Relied Upon.

The decision of the Appellate Court for the First District of Illinois is in conflict with the decisions of the Court of Appeals for Illinois and Pennsylvania.

The decision of the Appellate Court is contrary to the decisions of this Court in which cases this Court has laid down the principle of willful and malicious injury to another and of *res judicata*.

The question is one of importance in administering the provisions of the Bankruptcy Act. If the decision of the said Appellate Court is allowed to stand, its effect will be to overrule this and other federal courts and to penalize the innocent and reward the wrongdoer.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

A creditor, whose claim has been scheduled by the bankrupt, has the right, although his claim is exempt from discharge in bankruptcy, to oppose the discharge of the bankrupt.

In re Feuer (C. C. A. 2), 4 Fed. (2d) 892.
Meyer v. *Price,* 250 N. Y. 370; 165 N. E. 814 (reversing 230 N. Y. S. 875; 224 App. Div. 733).
Royal Indemnity Company v. *Cooper* (C. C. A.), 26 Fed. (2d) 585.
In re Kraemer (D. C. Minn.), 17 Fed. (2d) 110.
In re Armstrong (D. C. Cal.), 248 Fed. 292.
In re Lewis (D. C. N. Y.), 163 Fed. 137.
Corpus Juris Secundum, pp. 1388-89.
Collier on Bankruptcy (9th ed.), p. 311.
In re Rhutassel, 96 Fed. Rep. 597.
In re Thomas, 92 Fed. Rep. 912.
In re Tinker, 99 Fed. Rep. 79.

II.

It is a settled principle that a creditor whose claim is not dischargeable in bankruptcy may file his claim and accept what dividends are paid without waiving his right of exemption.

In re Lewis Frank & Son, 238 Fed. (C. C. A.) 773.
Friend v. *Talcott,* 228 U. S. 27.
Beyer v. *Sadvoransky, et al.,* 177 N. Y. S. 705.

III.

Where there is no actually contested issue and no order as to jurisdiction in a case, there can be no question of res judicata.

In the instant case no issue was raised, or contested, and there was no order in the bankruptcy proceeding as to whether petitioner's claim was exempt from discharge.

Friend v. *Talcott,* 228 U. S. 27.

Vallely v. *Northern Fire & Marine Insurance Co.,* 254 U. S. 348, 354.

Stoll v. *Gottlieb,* 305 U. S. 165.

IV.

The fact that an action grows out of a breach of contract does not prevent its being maintained in tort.

Cooley on Torts, 103-105, (2nd ed.), note 1.

Addison on Torts, 13.

Rich v. *New York Central & Hudson River Railroad Co.,* 87 N. Y. 383, 398.

Oliver v. *Perkins,* 92 Mich. 304, 310-316.

Orange Bank v. *Brown,* 3 Wendell (Mass.) 161.

Coggs v. *Bernard,* 2 Lord Raym. 909.

Greener v. *Brown,* 323 Ill. 221, 222-223.

Church v. *Anti-Kalsomine Company,* 118 Mich. 219.

Nevin v. *Pullman,* 106 Ill. 222.

Purington v. *Hinchliff,* 219 Ill. 152.

Kovar v. *Bremer,* 281 Ill. App. 525.

V.

While the action in the instant case was a bill in chancery praying for various forms of equitable relief, such as a rescission of the contract, the return of petitioner's patent, setting aside of judgments, the cancellation of promissory notes and an accounting regarding the advances made by the respondent to the petitioner, it also prayed for damages for the fraudulent and wrongful acts of the respondent, which the Master found and the Court decreed had been done by the respondent with intent to ruin the petitioner.

It has been repeatedly declared by the highest Courts of England and of this country that bankrupt laws are enacted with the object and intention of relieving honest men, but not rascals, from the burden of their debts.

In re Silverman, 22 Fed. Cas. 139.
Congressional Record, June 28, 1898.
In re Dow's Estate, 105 Fed. Rep. 889.
In re Becker, 106 Fed. Rep. 54.
Turner v. *Turner*, 108 Fed. Rep. 785.
Lubke v. *Thomas*, 116 U. S. 606.
In re Scott, 126 Fed. Rep. 981.
McDonald v. *Brown*, 10 Am. Bank Rep. 58.
Dister v. *McCanley*, 71 N. Y. Supp. 949.

VI.

An act lawful in itself becomes unlawful when it is done as one step in a scheme to defraud.

Rich v. *New York Central & Hudson River Railroad Company*, 87 N. Y. 382, 394.
Oliver v. *Perkins*, 92 Mich. 304, 310-316.

VII.

To ascertain whether the petitioner's claim was of such a character as to be exempt from a discharge in bankruptcy, the Court may examine the entire record to determine that fact.

Bank of Williamsville v. *Amherst Motor Sales, Inc., et al.*, 254 New York Supplemental (Appellate Div.) 825.

Loveland on Bankruptcy, Sec. 763.

In re Bernard, 278 Fed. 734.

Humphrey v. *Heller*, 283 N. Y. S. 915.

8 Corpus Juris Secundum, p. 1545, Sec. 579.

In re Petition of Chalukonis v. *Josziviak*, 287 Ill. App. 170, 172-173.

In re Petition of Blackledge, 359 Ill. 482.

Blattan v. *Evans, et al.*, 57 Ill. App. 311.

Kavanaugh v. *McIntyre*, 112 N. Y. S. 987, 128 App. Div. 722.

In re Greene (C. C. A. Ill.), 87 Fed. (2d) 951.

In re Davis (D. C. Tex.), 34 Fed. (2d) 778-780.

In re Armstrong (D. C. Cal.), 248 Fed. 292.

7 Corpus Juris 370, note 82.

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In re Fuller (D. C. Pa.), 18 Fed. Supp. 394.

In re Pulver, 146 Wash. 597, 11 Am. B. (U. S.) 512.

Ginsberg v. *International Shoe Co.* (Tex. Civ. App.), 299 S. W. 695.

VIII.

In his bill in chancery, the petitioner was not required to and did not elect between his remedies. He pursued all his remedies in his bill, not only those of an equitable character but his action in tort for the willful and malicious destruction of his business. He had a right so to pursue all his remedies. It is no answer to say that that cause of action grew out of a breach of contract.

Rich v. *New York Central & Hudson River Railroad Company*, 87 N. Y. 382.
Oliver v. *Perkins*, 92 Mich. 304, 310-316.
Greener, et al. v. *Brown*, 323 Ill. 221, 222-223.
Church v. *Anti-Kalsomine Co.*, 118 Mich. 219.

IX.

It makes no difference that some of the acts done in the accomplishment of an unlawful purpose are in themselves lawful. No person can legally, by direct or indirect means, obstruct or interfere with another in the conduct of his lawful business, and any loss willfully caused by such interference will give the party injured a right of action for all damages sustained.

Carlson v. *Carpenter Contractor's Association*, 224 Ill. App. 430 (aff'd 305 Ill. 331).
Purington v. *Hinchliff*, 219 Ill. 152.
Kovar v. *Bremer*, 281 Ill. App. 525.
White v. *White*, 132 Wis. 121, 111 N. W. 1116.
Hilliard on Torts, Vol. 1, 3d ed., p. 460.

In petitioner's bill, in which the said money decree was rendered, he prayed, in addition to the equitable relief asked for, that the defendant be (R. 59):

"Ordered and Decreed to Pay to Your Orator any and all other Losses which he may have Suffered by reason of the *Wronguful* acts of the defendant, Includ-

ing the Loss of his business and of the profits which he otherwise would have made, but for the said *Wrongful* acts of the defendant."

It is not material that the allegations of petitioner's bill of the fraudulent design and acts are coupled with the statement, that these acts were done in defiance of the contract, or that the words willful and malicious are not used. The controlling circumstance is that they constituted a breach born of that wider range of legal duty, which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud.

Humphrey, et al. v. *Heller, et al.*, 283 N. Y. S. 915.
Tinker v. *Calwell*, 193 U. S. 473.
Kerwhacker v. *C. C. & C. R. R. Co.*, 3 Ohio St. 188.
In re Stenger, 283 Fed. 459.
In re Dutkiewicz, 27 Fed. (2d) 334.
In re Greene, 87 Fed. (2d) 951 (C. C. A. 7).
In re Wegner, 88 Fed. (2d) 899 (C. C. A. 7).

IN CONCLUSION.

For the reasons above mentioned the petitioner respectfully submits that his petition for a Writ of Certiorari should be granted. His grounds therefor are more fully developed in the attached brief in support of his petition.

Respectfully submitted,

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